

**TOWN OF HENNIKER
ZONING BOARD OF ADJUSTMENT**

**APPROVED MINUTES
August 20, 2008**

Members Present: Doreen Connor, Vice-Chairperson; Joan Oliveira; Bob Stamps; Gigi Laberge, Alternate; Rick Patenaude, Alternate

Members Excused: Jeff Connor; Kris Blomback

Others Present: Laura Scott, Planning Consultant; Jennifer Astholz, Recording Secretary; Peter Flynn, Town Administrator; Barbara French; George Rennk; Bob Larking; John and Amanda French; Brenda Connor; Bruce Trivellini; Angela Robinson; William & Tania Craig; Terry Stamps; Theresa Maier; Michael Tierney; Dean Eggert; Katherine Mitchell; Jill Martin; Mark Mitch; Stephany Marchut Lavallee; Kathleen A. LaBone/LoFaro; Joyce Blythe; Sabrina Patenaude; Jeanne P. Davis; Pete Powers; Constance M. Powers; Jeffrey Roach; Jan Hale; Amy Augustine; Joanne Degnar; Kevin Degnar; Julia Houk; Linda Patterson; Kathleen Hatt; Janine Bates; Alan Michie; Daymon Murdough; Janis Poland; Robert Elinor; Larry Beagle; Leon Parker; Leo & Priscilla Duke; Robin Trombley; Sue Allen; Greg & Patty Jensen; Michael French; Chris Beeso; Kellie J. Dyjak; Ruth Zax; Joey Zax; William G. Fraser; Jennifer Parker; Will Abbott; Jennifer McCourt; Lisa & Daniel Sweeney; Karen Irwin; Jim Culhane; Gene Brown; Linda Martin; Laura Morgan; Ross Bennett; Susan Callahan; Tim Callahan; Andy Mitchell; Pam Garvey; John Trovato; Catherine & Kenneth Richard; Steve Kavadias; William Skladony; Dick Weiss; David Currier; Thomas Forsley; Renee Campbell; Peter Hale; Mellisa Huff; Tony Caplan; Denise Rico; Roni Hardy; Niall Campbell; Jasen Stock; Richard Conde; John J. Healy; Cathy Mayne; Holly Green; Daniel Whelton; Cordell Johnston, Jack McCormick, Louis Bravakis, Mike Lambert. There is one other name that is not legible on the sign-in sheet.

Vice-Chairperson Connor called the meeting to order at 7:07 pm. She stated that the Board will review minutes from past meetings first.

She explained that the protocol for the public hearing will be to hear from those who have neutral thoughts about the proposed project then the people who wish to speak in favor of the project will be called. After hearing public comments, the applicant will be allowed to present information.

Review of Minutes of the February 20, 2008 Meeting: The Board reviewed and corrected the minutes. Gigi Laberge **MOVED** to accept the amended minutes of the 2/20/08 meeting. Joan Oliveira **SECONDED** the motion. The motion **PASSED, 5-0**.

Review of Minutes of the May 21, 2008 Meeting: Laura Scott, Planning Consultant stated that there had been a question about the sign-in sheet at the last meeting. She found the

additional list of names today, and these will be added to the minutes for the record. Other corrections were made. Joan Oliveira **MOVED** to accept the minutes as amended. Gigi Laberge **SECONDED** the motion. Motion **PASSED, 4-0-1**. Bob Stamps abstained as he was not present at that meeting.

Continued Public Hearing

Case 2008-104: A request has been made for a Use Variance under 133-29. The applicant, Michael Bartoszek of Laidlaw Energy Group, on behalf of Granite State Forest Products, is proposing to construct a 20 MW renewable energy plant (clean biomass woodchips). A Use Variance is request to allow a renewable energy plant to operate. The property is located at 1192 Old Concord Road (Map 1 Lot 549 F2) in the Heavy Commercial (CH) District. This application is being noticed as a Development of Regional Impact, per NH RSA 36:54- 36: 57.

Vice-Chairperson Connor opened the public hearing at 7:16 pm. She stated that the last meeting on July 16, 2008 concluded at 11:00 pm after hearing public comments against the proposed project. She explained that she had requests to speak from some who are neutral about the proposal, and they will be heard first. Those in favor of the project will be heard next. She reminded the audience to be polite and respect others whose views may differ.

Cordell Johnston, Henniker resident, stated that he neither supports nor opposes the proposed facility. He implored the Board to make a decision that is legally sound because no matter what is decided the decision will probably be appealed. He stated that this is a very difficult, complex case. He stated that the Zoning Board of Adjustment is not responsible for regulating air pollution. There are well established criteria that must be used to evaluate a variance; if any of the criteria are not met, the variance cannot be granted. He stated that he is concerned that discussion is “wandering off the reservation.” Mr. Johnston stated that one of the criteria has to do with the project’s impact to surrounding property values. He stated that he has not yet heard persuasive evidence one way or the other on property value impact and suggested that the board retain an independent appraiser to give an opinion. He also stated that the applicant must show that there are special features of the land which make the proposed use reasonable. Mr. Johnston stated that there have been numerous references to the BioEnergy case in Hopkinton, but he has not heard any discussion of the Supreme Court’s decision in that case. He explained that the Supreme Court ruled in that case that local boards do not regulate air pollution, and yet most of the discussion has focused on that topic. While the board still has responsibility for public safety, he urged the board to tread carefully. Mr. Johnston strongly suggested that the board meet with the Town’s legal counsel. He stated that Hopkinton’s BioEnergy case is important as it applies to this case and must be considered. Mr. Johnston supplied a written letter to the board.

Bruce Trivellini, Henniker resident, referred to a case involving the Town of Chester. He stated that in that case, the Supreme Court’s ruling made it very clear that one of the criteria which must be determined involves impact to surrounding property values. He stated that the applicant must only state on the application that it is their opinion that the project will not have any negative impact on the surrounding properties. Dr. Trivellini

stated that should a board member or abutter question that statement, then the onus of proof falls to the applicant and the legal bar is raised. He recalled that Mr. Stamps referred to property values at a previous meeting, and an abutter also asked questions about his property value and impact to his well. He stated that this requires the applicant to show proof that the project will not diminish property values. To date, the abutter has not received an answer. Dr. Trivellini stated that the board must get ample information of what this project will really look like and how it will affect the Town.

Vice-Chairperson Connor opened the floor to those who wish to speak in favor of the proposed project.

Barbara Connor French, State Representative for Merrimack District 5, stated that she has no financial interest in this project but is only interested in the technology. She stated that she has been concerned about renewable energy sources for a long time and has lived in a super-insulated house for 23 years. She stated that wood energy is an important role in New Hampshire's future. She shared information concerning HB 873 which passed in May 2007. She stated that the Renewable Energy Act calls for the use of renewable energy and fuel sources which will help to keep money within our State. She stated that new technologies are within the public's best interest as they can diminish greenhouse gases. The Renewable Energy Act requires that each supplier in New Hampshire to demonstrate that they are obtaining about 25% of their fuel from renewable sources by the year 2025. She stated that this facility will help New Hampshire meet this requirement. Ms. French stated that DES was important in implementing the legislation. Ms. French read from a written statement about the legal requirements of emissions of nitrous oxide, particulate matter and other emissions. She stated that she has recently heard leading environmentalists say that global warming is a more serious issue than they had thought. She also quoted RSA 362.F.6 regarding certification of Class I facilities under the public utilities section. She stated that this facility will be required to burn only clean wood chips, DES must use accurate methods of testing, the facility will be required to continuously monitor emissions, and other strict regulatory methods are imposed. Ms. French also supplied a copy of legislation which prohibits the burning of construction and demolition (C&D) debris. Ms. French read for the record a letter by Dr. Robert McLellan, MD, that this proposed use would not have an adverse public health impact. Ms. French concluded by urging the board not to come to a premature conclusion but to adequately research the information and support renewable energy technology.

Board member Gigi Laberge asked Ms. French to define "virgin wood chips." Ms. French stated that she is not an expert, but stated that a member of the timber industry would be there shortly who could answer that question.

Melissa Huff of the Conservation Law Foundation (CLF) stated that the organization has been involved in most of the environmental issues in New England. She stated that the organization is committed to improving the air quality in New Hampshire, has taken a leading role in passing greenhouse gas initiatives and has long been involved in renewable energy technologies. She stated that the CLF shares many of the same concerns as REACH, especially concerning lead emissions. She stated that a main difference between

Hopkinton's BioEnergy facility and this proposed facility is that BioEnergy was burning construction and demolition debris. She stated that the facility was emitting 0.6 pounds of lead per hour which equaled 2.6 tons per year. She stated that this is much greater than any acceptable limits. The CLF petitioned the EPA to address those concerns. She stated that the proposed facility by Laidlaw is very different than the plant in Hopkinton as they will only be using clean biomass. Advanced controls are implemented to decrease emissions to well within regulated limits. She presented an EPA factsheet on NOx emissions for the board's review. She stated that CLF will support a properly permitted facility. She also spoke in favor of Mr. Johnston's comments urging the board to follow zoning variance criteria. Ms. Huff stated that the need for a variance is really only the first step in a long process. She stated that there is a very long regulatory process that must be followed as all stationary sources have to secure permits. She stated that risk-based analysis is done by professionals in the industry, and then legislation governs the various agencies. DES would conduct modeling tests; and based on the results, DES has options to dictate the best safety methods.

Ms. Huff stated that Laidlaw has a strong economic interest to comply with the Renewable Energy Portfolio standards. When a facility qualifies, they get to sell renewable energy credits; they sell power and get money based on the renewable energy. One credit is equal to 1 MW hour. They have the incentive of an additional income stream from this project. Their income will decrease if they do not comply with the law.

Ms. Laberge stated that other incentives in the 1980's were in place and then were rescinded in the 1990's. She asked if this could happen to this renewable energy credit process. Ms. Huff stated that the legislation she was speaking of was passed in 2007 with broad support. She stated that it is a way to encourage a market for new technologies, and she believes that it will be viable at least until the renewable energy market becomes stable.

Ms. Huff stated that utilities have to purchase much more from renewable energy sources each year. They can buy renewable energy credits to comply with these requirements. Therefore, the project will not be financially feasible for Laidlaw if they do not comply with the law.

RSA 362.F.2 was discussed as it was amended during the last legislative session to clarify that Class I facilities are absolutely prohibited from burning construction and demolition debris, and only clean organic matter may be used for fuel. Ms. Huff also read the definition of biomass. She stated that the NHDES Commissioner has testified in the past that "...there is no silver bullet, only silver buckshot" that can be taken to decrease greenhouse gases. Ms. Huff stated that the EPA concluded that there is no net increase of CO2 from biomass plants; the US Energy Administration concluded that there will be a large increase of biomass plants in operation. It was concluded that there is nearly zero net increase of CO2 emissions of biomass operations over what is already associated with harvesting and transporting trees.

Ms. Huff stated that there was a lot of testimony given at the July 16 ZBA hearing about the emission of noxious gases. She presented a pie chart which showed that most

emissions are from driving cars. Only one-quarter of noxious emissions are related to utilities in the United States.

Vice-Chairperson Connor asked who has jurisdiction to regulate the emissions from the smokestacks. Ms. Huff stated that while NHDES has jurisdiction, the EPA also plays a role.

All citations of the facts as presented by the CLF representative are noted in a letter that was submitted to the board on August 16, 2008.

Michael French, Henniker resident, stated that he is related to the property owner as well as to the owner of the log home business which would buy steam from this plant. He, however, claims no financial interest in the proposed project, but has a longstanding interest in sources of renewable energy. He stated that Rep. French is his mother. Mr. French stated that he served on the Henniker ZBA from 1996-2002 and was the chairman for two years.

Mr. French asked the board to review the hardship criteria of the variance application. He stated that if Laidlaw had applied for this several years ago, it probably would have been denied; however, the Supreme Court has made changes to the criteria. He referred to the case of Simplex v. Town of Newington. Special conditions rendered the proposed use reasonable. Special conditions include the proposed site's "unique setting in its environment." Mr. French questioned the board's decision that generating electricity was not determined to be manufacturing, and then quoted various definitions. He referred to RSA's 38:1 and 38:2 and supplied information whereby the Supreme Court and the Public Utilities Commission have accepted the utilities process as manufacturing. He then quoted the Attorney General of Kentucky who stated that "...electricity can be made or produced by man." Mr. French stated that he was respectfully making the case that this use really falls under the definition of manufacturing as the process produces an item; therefore, it stands as a reasonable use of the property.

Mr. French stated that there are unique features of the property, including the close proximity to existing transmission lines, and again referred to the Simplex case which led to the creation of the constitutional right to enjoy one's property. In the Rancourt v. Manchester case, property owners were prohibited from having horses in a residential zone. It was determined that the use was reasonable. He stated that this case involves a property which abuts the property that will supply its feedstock and a property that wishes to use the steam heat for his kiln for drying wood. The size of the lot (approximately 9 acres) is ample for the facility, but small enough for efficient operation. He stated that the unique circumstances create an ideal opportunity for the proposed use. He stated that a natural buffer is created by wetlands and a pond to the north and a large area owned by the Army Corps of Engineers and the river to the south. Trees also buffer other neighboring properties. He pointed out that there are other manufacturing/industrial uses in the area including a concrete plant (Redi mix); wood pallet plant (HHP); asphalt plant (Pike); and the construction & aggregate plant (Fosters). Mr. French stated that these factors show that the proposed use is essentially an allowed use in the heavy commercial district.

Regarding fair and substantial justice, Mr. French stated that there is no explicit prohibition of a power generating facility in the ordinance, and other companies in the district have electrical generators on their sites.

Mr. French stated that the air pollution component of the argument must be removed as DES and the EPA have jurisdiction over this area. If you remove the air quality argument all that is really needed is a variance for something that is too tall, much like a cell phone tower. Therefore, it is his opinion that the application satisfies the criteria.

Mr. French stated that the ZBA process is only one hurdle that must be cleared in order to operate the plant. He stated that the board need not, and should not, make findings on every item of concern; DES, EPA, and the Planning Board all have purview. He stated that the ZBA should restrict the depth of their inquiry as there are other agencies to address all of the issues. The ZBA should not require modeling when other criteria must first be met. Mr. French stated that the board can attach conditions to the approval as they see fit. He stated that the Planning Board will enforce regulations regarding lighting, traffic, noise, pollution and harmonious development during the course of site plan review. He suggested that the board meet with Town counsel as it is a complex case with overlapping board responsibilities.

Mr. French respectfully requested that the board continue the hearing and invite DES and the Planning Board to testify as to their roles in the process. Mr. French submitted written documentation of his comments to the board.

Jennifer McCourt, Henniker resident and civil engineer, stated that initial reading of the REACH propaganda was horrifying. After researching the claims as stated, she found them to be erroneous and skewed to increase the fear factor. Ms. McCourt stated that this new technology has no comparison to be found in New Hampshire. She stated that she consulted USGS maps to find the wind corridor of the 20-year old Springfield plant. Southeast of the plant lies little Lake Sunapee, New London, etc. She stated that the area is affluent and property values there are not diminishing. She stated that there is a significant population of older people, and there are no increased health concerns relative to the power plant.

Ms. McCourt stated that there was a lot of discussion about whether the use is considered commercial manufacturing or light industry. Either way, she says that it is apparent that the majority of the board thinks that it is a reasonable use in some way. Ms. McCourt stated that her 22 years of experience working with DES proves that they have increased stricter regulatory measures. She stated that more licensed professionals and more permits are needs to comply with stricter regulations.

In regards to the well on the abutter's property, a condition can be placed on approval stating that the design cannot adversely affect any neighboring wells.

Ms. McCourt read written comments on behalf of resident Barbara Bernstein who could not attend the meeting tonight. The letter stated that sitting in traffic exposes us to the same pollutants that have been described by this facility. New Hampshire has a renewable and reliable source of energy to ensure that electricity is available. A copy of the letter was given to the board.

Jason Stock of the New Hampshire Timberland Association was invited to the meeting by Rep. French. He stated that the Timberland Association is a trade association which promotes sustainable management of New Hampshire forests. Mr. Stock presented a report to the board outlining statistics. He stated that cost-effective management requires three different markets for wood: 1) productive wood; 2) pulp and paper industry; 3) biomass energy. He stated that 30%-40% of the forests consist of low grade wood. The biomass energy facilities provide a niche for the processing of this wood. The association anticipates that biomass facilities will increase as the pulp and paper industry decreases throughout the State.

Mr. Stock explained that a saw mill takes a round log and cuts them to make flat boards. The scrap wood gets chipped. Mr. Stock stated that he does not know the specific details of the proposed project or of Laidlaw Energy; however, biomass is a viable option to produce heat and electricity. He stated that another benefit of biomass is that it is a home-grown fuel which economically benefits the State. Several studies show that New Hampshire has vibrant forests throughout the State. Some areas of the State have more clear cutting, and other areas are densely forested, and forestry management must consider the whole. He stated that this patchwork management style actually helps wildlife management. Mr. Stock stated that development and increasing amount of pavement pose greater threats to our forests.

Mr. Stock stated that he is not speaking for or against the proposed facility but wanted to speak in favor of the wood chip biomass industry.

Ms. Laberge stated that she is curious about the definition of the type of wood that will be used and is concerned about the possible changes to the definition in the future. Mr. Stock stated that construction debris is more related to wood that has been treated, painted, etc, and saw mill uses are legitimate biomass.

Ms. Laberge asked if all of the power plants in NH are member of the Timberland Association. Mr. Stock answered no. When asked if Laidlaw is a paid member of the association, Mr. Bartoszek stated that they are not yet, but plan to be.

At this point, audience members wanted to ask some questions. Vice-Chairperson Connor denied the requests so that all who came to speak in favor would be allowed time. She stated that there will be a chance to ask questions after all presentations have been heard. Daniel Whelton, Henniker resident, stated that he was very concerned by the REACH pamphlet that was distributed. He stated that the transmission lines make the property unique for this use, and it would be a hardship to be told that they would have to build elsewhere. Mr. Whelton also reminded the audience that electricity does not come from an

outlet. He rhetorically asked that if we dubbed this “organic electricity” would anyone be against it. Mr. Whelton commented about traffic and stated that the new Dunkin Donuts will probably cause more trouble than the professional tractor-trailer drivers who would be working at the facility. He also made comments relative to RSA 36:54(3) stating that this is an issue which must be addressed by the residents and board of Henniker. Mr. Whelton also wanted it made known that one of the organizations - ISO New England - used on REACH’s pamphlet is a non-profit organization who does not make money but makes sure that people get the cheapest commodity first. Mr. Whelton asked if Laidlaw has applied to pay taxes on a smaller valuation. Vice-Chair Connor stated that they do not have that information yet. Mr. Whelton stated that definitions create a catch-22 as electricity cannot be shipped on a truck like other manufacturing. He stated that he is in favor of the plant.

Jack McCormick, Laidlaw’s attorney who says that he lives within close proximity to a biomass plant, stated that the five variance criteria cannot be decided in a vacuum. He stated that they invited representatives from DES to the meeting, and two witnesses were to testify to the environmental health and safety of biomass facilities. He stated that they were not speaking in favor or against the project, but were invited to present the facts. He received a phone call at the last minute that they could not, or would not, come to the meeting unless the ZBA invited them. He formally requested to adjourn the proceedings and request the ZBA to invite DES to testify.

Vice-Chairperson Connor stated that the board needs to discuss his continuance request. She reported that she received an email from DES late yesterday asking if the ZBA would invite them. She responded that their appearance was up to them.

Mr. McCormick stated that their presentation is contingent on the DES information; therefore, they request to continue the hearing.

Laura Scott read the DES email for the record. She also read Ms. Connor’s response which stated “that while she could not discuss the case outside the public hearing DES could speak, DES could speak as an organization with neutral comments or they could testify with Rep. French.”

Mr. McCormick apologized to the audience who expected to hear a presentation from DES. He understands that the information presented in the REACH flyer is very scary; however, there are a number of items that either distort the truth or present false statements. Speaking to the questions about paying taxes, Mr. Bravakis stated that they have several options. They can apply for abatement credits or go to the Board of Selectmen to negotiate payments. He assured the public that there is no law that would ever allow them to pay pennies on the dollar for their share of Town property taxes. Mr. Bravakis stated in regards to the DES presentation that in a call received this morning, it seems that there is some concern that DES not take a partisan role. He stated that the board and the public need credible information from the State agency that is responsible for public health and safety. They have had two meetings in preparation for tonight to bring the environmental community together with representatives of the industry.

He stated that it is important to relieve the public's stress about these issues. Vice-Chair Connor polled the board for their opinions. Mr. Stamps stated that there are other reasons to continue the hearing, so he feels that it is a reasonable suggestion.

Joan Oliveira **MOVED** to continue the hearing to October 15, 2008, so that the ZBA can invite DES to the next meeting of the board and so that the Board may obtain a report from an independent real estate appraiser on the applicants potential impact to surrounding property values. Bob Stamps **SECONDED** the motion. Motion **PASSED, 5-0.**

Other items to be addressed include: an independent evaluation of the impact, if any, on surrounding property values; location of power towers; magnitude and size of the towers; description of power transmission, lines, etc.; visual impact of facility and transmission lines.

Mr. Bravakis stated that the actual design of the facility and smokestack would be determined in the planning and design phase.

There was discussion about what would happen to the site if the wood chip industry is no longer a viable operation.

Vice-Chair Connor stated that Board members would have an opportunity to ask their questions upon completion of the entire presentation.

Ms. Laberge stated that she is very concerned about the truck traffic needed to supply this facility. She asked for details of carrying the tons of fuel that would be needed, and what would be necessary to operate if Cousineau's business was not in partnership with the facility.

The board discussed possible meeting dates. Eleanor Kjellman asked if there would be other opportunities for the public to ask questions or comment on information that is being presented. Vice-Chair Connor noted the request and stated that she would clarify the protocol with legal counsel.

Discussion followed about the independent real estate appraisal of potential impact to surrounding property values. The board asked the applicant to create an escrow account to cover cost of the appraisal. The board then discussed the scope of the independent consultation. It was noted that the appraiser must look at the town of Henniker specifically as there are residents that live in the commercial zone. Mr. Stamps suggested looking at the impact within specific zones such as a half-mile radius, one-half mile to one-mile radius and one mile to two mile radius. Ms. Laberge stated her opinion that the range should extend past two miles.

Vice-Chairperson Connor **MOVED** to have Ms. Oliveira provide a list of certified bank appraisers to whom we would send a proposal asking them for an estimate to determine the effect, if any, of this application on property values within 0-1/2 mile radius, and 1/2-mile to

1-mile radius. Ms. Oliveira **SECONDED** the motion. Motion **PASSED, 5-0-1** (Ms. Laberge abstaining).

Mr. McCormick asked to be notified of the estimated costs, though the board will make the determination of which appraiser will be used.

Mr. Currier, resident, stated that a one-mile radius may be too small of an area.

Ms. Scott stated that she will write a letter to DES inviting them to the next meeting. She will also write a memo to the applicant asking them for specifics relating to any waste produced at the site, estimated truck traffic hauling biomass fuel anticipated for operation of facility, building design, and location of power transmission lines.

Vice-Chairperson stated that the ZBA is expressly forbidden to discuss this case with anyone outside of a public hearing; therefore, she requested that any further public mailings do not suggest contacting individual board members for discussion. Written letters will be read and entered into the case file.

Review of July 16, 2008 Meeting Minutes: The board reviewed and corrected the minutes. It is noted that a written letter from Jessica Scheinman received on 8/12/08 be attached to the minutes as requested to capture her thoughts in their entirety.

Ms. Oliveira **MOVED** to accept the minutes as corrected. Mr. Stamps **SECONDED** the motion. Motion **PASSED, 4-0-1 (Rick abstained since he did not attend the entire meeting)**.

Board Elections:

Bob Stamps **MOVED** for Joan Oliveira to serve as Vice-Chairperson of the ZBA. Gigi Laberge **SECONDED** the motion. Motion **PASSED, 5-0**.

Joan Oliveira **MOVED** for Doreen Connor to serve as Chairperson of the ZBA. Mr. Stamps **SECONDED** the motion. Motion **PASSED, 5-0**.

Law Lecture Series: Ms. Scott stated that there is available money in the ZBA budget if any board members would like to attend.

Bob Stamps **MOVED** to adjourn at 11:00 pm. Ms. Laberge **SECONDED**. Motion **PASSED, 5-0**.

Respectfully submitted,
Jennifer Astholz